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In the Supreme Court of the United States

OCTOBER TERM, 1957

MORRIS MAC SCHWEBEL, PETITIONER

v.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 46a–54a) is reported at 153 F. Supp. 701. The opinion of the Court of Appeals (R. 57) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1958 (R. 58). The petition for certiorari was filed on February 25, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

STATUTES AND RULES INVOLVED

Section 23 (a) of the Securities Exchange Act of 1934, 48 Stat. 901, as amended, 15 U. S. C. 78w (a), provides in pertinent part:

> The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. * * *

Similar power to make rules and regulations is contained in the other statutes administered by the Commission.[1]

Rule II of Commission's Rules of Practice, 17 C. F. R. § 201.2, provides:

> *Appearance and practice before the Commission.* (a) An individual may appear in his own behalf, a member of a partnership may represent the partnership, a bona-fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of a State commission or of a department or political subdivision of a

[1] Thus it is provided in Section 19 (a) of the Securities Act of 1933 (48 Stat. 85, 15 U. S. C. 77s (a)) that the Commission may make such rules and regulations "as may be necessary to carry out the provisions of this title"; in Section 20 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 833, 15 U. S. C. 79t (a)), "as it may deem necessary or appropriate to carry out the provisions of this title"; in Section 319 (a) of the Trust Indenture Act of 1939 (53 Stat. 1173, 15 U. S. C. 77sss (a)), "as it may deem necessary or appropriate in the public interest or for the protection of investors to carry out the provisions of this title"; in Section 38 (a) of the Investment Company Act of 1940 (54 Stat. 841, 15 U. S. C. 80a–37 (a)), and in Section 211 (a) of the Investment Advisers Act of 1940 (54 Stat. 855, 15 U. S. C. 80b–11 (a)), "as are necessary or appropriate to the exercise of the powers conferred upon the Commission."

State may represent the State commission or the department or political subdivision of the State, in any proceeding.

(b) A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

(c) A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this section.

(d) Any person appearing before or transacting business with the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his authority to act in such capacity.

(e) The Commission may disqualify, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing in the matter

(1) Not to possess the requisite qualifications to represent others; or

(2) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

(f) Contemptuous conduct at any hearing before the Commission or a hearing officer shall be ground for exclusion from said hearing and for summary suspension without a hearing for the duration of the hearing.

(g) For the purposes of this section, practicing before the Commission shall include the

preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

Section 9 (b) of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1008 (b), provides:

> In the exercise of any power or authority—
>
> * * * * *
>
> (b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such applica-

tion shall have been finally determined by the agency.

QUESTION PRESENTED

Whether a private hearing ordered pursuant to the Securities and Exchange Commission's Rules of Practice to determine whether an attorney should be disqualified from practicing before the Commission, on the ground that he had engaged in unethical and improper professional conduct in an administrative proceeding before the Commission, may be enjoined prior to the commencement of the private hearing on the basis of contentions (1) that the Commission is without statutory authority to conduct the proceeding and (2) that the proceeding was instituted without first affording the attorney an opportunity under Section 9 (b) of the Administrative Procedure Act "to demonstrate or achieve compliance with all lawful requirements."

STATEMENT

The Securities and Exchange Commission on May 6, 1957, issued a notice and order for a private hearing pursuant to Rule II (e) of its Rules of Practice (*supra*, p. 3) to determine whether petitioner should be disqualified, temporarily or permanently, from practicing before the Commission. The notice and order for hearing alleged that petitioner was an attorney practicing before the Commission within the contemplation of Rule II and that the Commission had reason to believe that he had engaged in unethical and improper professional conduct in nine particulars, consisting essentially of (a) know-

ingly permitting misleading information which he had filed with the Commission to remain uncorrected after beng advised that it was inaccurate; (b) assisting others in violating the registration provisions of the Securities Act of 1933 (48 Stat. 85, 15 U. S. C. 77) by furnishing to a stock exchange legal opinions, to be used as a basis for a claim to exemption, without adequately inquiring as to the factual basis of the opinions or revising them when he learned or should have learned that the assumed facts were inaccurate; and (c) testifying falsely in formal Commission proceedings (R. 8a–13a).

Prior to the hearing and without having filed any answer to the charges against him, petitioner filed with the Commission a motion to dismiss the disqualification proceeding on the ground that the Commission was without jurisdiction in the matter and a supplemental motion to dismiss the proceeding on the ground that it had been instituted in violation of Section 9 (b) of the Administrative Procedure Act (*supra*, p. 4). The Commission denied these motions (R. 19a–28a).

Petitioner then instituted the present action by filing a complaint in the District Court for the District of Columbia on June 24, 1957, seeking to enjoin the then incumbent members of the Commission from maintaining the disqualification proceeding against him. On motion of the Commissioners, the District Court entered its order and judgment dismissing the petitioner's complaint and accordingly denied petitioner's motion for preliminary injunction (R. 54a).

Although the District Court had rejected petitioner's arguments on the merits (R. 46a–54a), the Court of Appeals affirmed on the ground that "the plaintiff failed to exhaust his administrative remedy * * *" (Pet. App. 19).

ARGUMENT

The holding of the court below that the petitioner failed to exhaust his administrative remedy is clearly correct, is not in conflict with the decisions of any other court of appeals or of this Court, and is indeed required by a long line of decisions of this Court and the lower courts.

Petitioner of course is entitled to review of any final order of the Commission permanently or temporarily disqualifying him from practicing before the Commission.[2] This Court, however, has repeatedly emphasized that review of an agency's action is not to be had piecemeal but that administrative remedies must first be exhausted before court review is available. See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding*

[2] Section 25 (a) of the Securities Exchange Act of 1934 (48 Stat. 901, 15 U. S. C. 78y (a)) provides that any person aggrieved by an order issued by the Commission may obtain review thereof in the court of appeals wherein he resides or has his principal place of business or in the Court of Appeals for the District of Columbia. Similar review provisions are contained in the other Acts administered by the Commission. See Sections 9 of the Securities Act of 1933, 48 Stat. 80, 15 U. S. C. 77i; 24 (a) of the Public Utility Holding Company Act of 1935, 49 Stat. 834, 15 U. S. C. 79x; 322 of the Trust Indenture Act of 1939, 53 Stat. 1175, 15 U. S. C. 77vvv; 43 (a) of the Investment Company Act of 1940, 54 Stat. 844, 15 U. S. C. 80a–42. See also Section 10 (b) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 (b).

Corp., 303 U. S. 41, 50–52; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385; *Macauley* v. *Waterman Steamship Company*, 327 U. S. 540, 543; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 764–774; *Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Franklin, Regional Council, Wage Stabilization Board et al.* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Whitehouse et al.* v. *Illinois Central Railroad Co., et al.*, 349 U. S. 366, 373–374.

The *Myers* case (*supra*) specifically held that the rule as to the exhaustion of administrative remedies is applicable even where it is alleged that the agency is without jurisdiction. We submit that the rationale of the rule is equally pertinent whether the contention is, as in *Myers* (303 U. S. at 47), that the statute under which the agency acts does not authorize the proposed procedure because there is no interstate or foreign commerce involved or, as in the instant case, that the statute does not authorize the proposed procedure because it contains no specific language stating that the agency may conduct a proceeding to disqualify an attorney from practicing before it. Only recently this Court reaffirmed the settled principle that "If, as in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, and *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." *Public Utilities Comm'n of Calif.* v. *United States*, No. 23, this term, decided

March 3, 1958 (slip opinion, p. 5). If exhaustion is thus required even where the validity of the basic statute underlying the administrative proceeding is challenged, then it would seem all the clearer that exhaustion is required where (as here) only the agency's construction of an admittedly valid statute is challenged.[8]

Myers also makes clear "that the mere holding of the prescribed administrative hearing" may not be considered irreparable damage for the purpose of cir-

[8] Nor is the construction involved here open to any substantial doubt. In the court below, petitioner did not dispute the District Court's holding, on the authority of *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, and *Herman* v. *Dulles*, 92 App. D. C. 303, 205 F. 2d 715, that under its general statutory power "to make such rules and regulations as may be necessary" for the execution of the functions invested in it by Congress (see page 2, *supra*), the Commission has implicit authority "to establish qualifications for attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct * * *" (R. 50a). Petitioner argued that the Commission's Rule II was invalid, contending in effect (1) that a federal administrative agency may not disqualify an attorney from representing others in proceedings before it, no matter how unfit it might find him, unless the agency has first established a "bar," and (2) that Rule II (whereby the Commission has limited the attorneys who may represent others in proceedings before it to those "admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia") does not create a "bar." The District Court found that the Commission had adequately implemented its authority by Rule II, stating "It is not essential that a roster of the bar be maintained, but is sufficient that the Commission has prescribed by regulation the qualifications for admission to practice before it" (R. 50a).

cumventing the rule requiring exhaustion of the administrative remedy (303 U. S. at 51–52). See also *Allen* v. *Grand Central Aircraft Co., supra,* at 540. As the court below has previously held, the fact that the proceeding may ultimately result in disciplining an attorney does not affect this doctrine. *Camp* v. *Herzog,* 190 F. 2d 605 (C. A. D. C.). Moreover, in the instant case, the Commission took all steps in its power to prevent any harm to petitioner by ordering a private hearing; the fact that the Commission had instituted the proceeding became public only when petitioner filed his complaint in this action. The petitioner here, like the petitioner in *Myers,* can be subjected to no disability until the conclusion of the hearing he seeks to enjoin.

The petition (p. 6) relies on *Skinner & Eddy* v. *United States,* 249 U. S. 557, for the proposition that the *Myers* rationale is inapplicable where the agency is alleged to have exceeded its statutory power. In that case, however, the administrative proceeding had been completed, and a final order entered, prior to the plaintiff's action to obtain judicial review; indeed, the action was one to enjoin enforcement of the order (*i. e.,* raising railroad rates) which was already being applied adversely to the plaintiff (*id.* at 562). And in *Public Utilities Comm'n of Calif.* v. *United States, supra,* the exhaustion requirement was held inapplicable "where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant" (slip opinion, p. 5). The

other decisions relied upon by petitioner (Pet. 6) are similarly distinguishable.[4]

It has been uniformly held that the rule as to exhaustion of administrative remedies is equally applicable where it is charged that the Administrative Procedure Act is being violated.[5] In this respect,

[4] *Gonzales* v. *Williams*, 192 U. S. 1, 15, was a habeas corpus action brought by an alien already being held in custody. The remaining cases relied on by petitioner are *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 515, and *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535. In the first of these cases, this Court pointed out that the orders of the state commission which had been enjoined were "on their face plainly invalid" as in conflict with a federal act and the expenses to the company of the rate proceeding sought to be instituted by the state commission would have been contrary to the interest sought to be protected by Congress in enacting the federal statute (317 U. S. at 469). The *Panhandle* case did not involve an injunction against an administrative agency; it was the agency that sought to restrain action pending its hearing. In the *Allen* case, where this Court did pass on (and uphold) "the right of the Government to hold [the challenged] administrative hearings" in reversing a lower court decision granting injunctive relief, the Court stated that "There is grave doubt of the right of [the plaintiff] thus to test the validity of administrative procedure before exhausting it or bringing the issues closer to a focus than it has done" (*id.* at 540) and that "it would be premature action on our part to rule upon [the other arguments submitted by the plaintiff as to the interpretation and constitutionality of the statute] until after the required administrative procedures have been exhausted" (*id.* at 553). In *Allen*, moreover, the claim was that the entire administrative machinery—including the agency itself—lacked any basis in the statute (*id.*, at 514, 550–551, 553); here, no such contention is, or can be, made (see note 3, *supra*).

[5] The Commission's position is that the provision of Section 9 (b) of the Administrative Procedure Act which petitioner charges the Commission violated is not applicable to a pro-

the court below followed its earlier decisions in *Camp* v. *Herzog, supra,* and *Riss & Co.* v. *Interstate Commerce Commission,* 179 F. 2d 810, both of which held that the attempted judicial review was found to be premature. In the *Camp* case, one of the charges involved was that there had not been compliance with Section 3 (a) of the Administrative Procedure Act, relating to publication in the Federal Register. In the *Riss* case, it was alleged that the hearing examiner had not been appointed and qualified in compliance with Sections 5 and 11 of the Act. Similarly, the Court of Appeals for the First Circuit in *Eastern Utilities Associates* v. *Securities and Exchange Commission,* 162 F. 2d 385, held that an alleged violation of Section 5 (a) of the Administrative Procedure Act, providing that "due regard shall be had for the convenience and necessity of the parties or their representatives" in fixing the time and place for hearings, might be reviewable only in connection with

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ceeding to disqualify an attorney from practice before it; that, even if that provision were otherwise applicable, the exception therein with respect to "cases of willfulness" or cases where application of the provision would be contrary to the "public * * * interest" would make it unnecessary to follow the procedures specified therein; and that in any event petitioner had the essence of the protections contemplated by those procedures.

The District Court indicated that the statutory provision involved could be applicable to a proceeding to disqualify an attorney from practice, but held that it was not applicable here by reason of the exception as to "willfulness" and that in any event the Commission had "in effect, complied with the notice requirements of § 9 (b)" (R. 52a). In view of its determination that the plaintiff failed to exhaust his administrative remedy, the Court of Appeals held that the District Court "erred in ruling on the Commission's authority to disbar attorneys" (R. 57).

the ultimate determination of the proceeding by the Commission.[6] Allowing an exception from the exhaustion rule merely on the basis of an alleged violation of the Administrative Procedure Act would substantially frustrate the purpose of that rule to eliminate the delay which would result from piecemeal judicial review, since in almost every administrative proceeding astute counsel could presumably find some arguable point as to the procedure followed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] The Administrative Procedure Act itself (Section 10 (c)), contemplates that, in the absence of an express statutory provision to the contrary, "preliminary, procedural or intermediate agency action" is to be reviewed "upon the review of the final agency action."

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